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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM: 1983

ORLANDO CANEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
AUG 22 1983
Alexander L. Stevas, Clerk

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the District Court of the Virgin Islands, whose judges have less than lifetime tenure and are subject to removal by the President, have constitutionally sufficient jurisdiction to try cases under the United States Criminal Code even though the Virgin Islands is subject to immediate rule from Washington?

2. Are the due process rights of petitioner violated by his conviction for violating federal fraud laws through his local activity as an employee of the Government of the Virgin Islands on the premise that that Government is a federal agency, when the Virgin Islands Organic Act fails to define cause for removal of judges of the District Court of the Virgin Islands?

3. Did the Court of Appeals err in holding that petitioner could violate 18 U.S.C. § 1001 by purely local action on the ground that the Government of the Virgin Islands is an agency of the United States for purposes of § 1001?

PARTIES BELOW

Petitioner's co-defendant, Jose Figueroa, appeared as an appellant in the proceeding in the Third Circuit Court of Appeals whose judgment is here sought to be reviewed by this petition.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is now reported at 708 F.2d 894 (3rd Cir. 1983) and is found in the appendix to this petition at p.4a. The opinion and order of Judge David O'Brien in the District Court of the Virgin Islands is unpublished but is also found in the appendix to this petition at p.12a.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A panel of the Third Circuit Court of Appeals entered its judgment on May 31, 1983. App. at p. 3a. A timely Petition for Rehearing En Banc was filed on June 13, 1983. On June 23, 1983, the petition for rehearing was denied. App. at p. 1a. 28 U.S.C. § 1254(1) is believed to confer jurisdiction on this Court to review the judgment of the Third Circuit Court of Appeals by a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 3, United States Constitution, Section 1, states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article 3, United States Constitution, Section 2, states in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ...

Article 4, United States Constitution, Section 3,

Clause 2, states:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

18 U.S.C. § 2 states:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371 states in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, [illegible] covers up by any trick, scheme, or device a material fact, or makes any

false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343 states:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmit or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more that Five years, or both.

18 U.S.C. § 2314 states in pertinent part:

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited ... shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

48 U.S.C. § 1561 states in pertinent part:

No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal cause to give evidence against himself; not shall any person sit as judge or magistrate in any case

in which he has been engaged as attorney or prosecutor.

48 U.S.C. § 1614 states in pertinent part:

> The President shall ... appoint two judges for the District Court of the Virgin Islands, who shall hold office for terms of eight years ... unless sooner removed by the President for cause.

STATEMENT OF THE CASE

In 1976 and 1977 the Government of the Virgin Islands, Public Works Department, Division of Roads and Highways, was badly in need of heavy trucks. As the Director of that Division, petitioner was authorized to purchase several from Mr. Jose Figueroa of Puerto Rico, at very good prices at a bankruptcy sale. Apparently, however, various officials of Public Works misunderstood the role of Mr. Figueroa in the sale. They all testified at trial that at a single meeting more than 5 years earlier petitioner had represented that Mr. Figueroa was the administrator of the bankrupt estate.

Mr. Figueroa was a businessman who had been appointed a court administrator in Puerto Rico, but had bought the trucks and others from the actual administrator of the bankrupt estate.[1/] The bankruptcy administrator had told petitioner that Mr. Figueroa

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1/ A former president of the Bar Association of Puerto Rico testified at trial that in Puerto Rico's civil law a "court administrator" is a judicially appointed individual who is charged with the administration of an intestate estate.

had owned the "whole lot."

Petitioner's then supervisor, the former commissioner of Public Works, testified that although he may have misunderstood the role of Mr. Figueroa, in any event it would not have made a difference to him if the seller was a middle man since he would have gone ahead with the purchase anyway. The former commissioner stated during trial that he had no doubt that he would want petitioner as his director if he became commissioner again.

Following the purchase of the trucks by petitioner, Mr. Figueroa requested from Public Works that a public unpaved and hazardous road, which bounded property the latter had purchased to build an FM transmission tower, be paved. The commissioner granted authorization to petitioner to pave the road on condition that Mr. Figueroa pay for any overtime work done by the Division's workers.

In August of 1978 the United States Attorney filed an information charging petitioner and Mr. Figueroa with various fraud and embezzlement charges under Virgin Islands law, alleging in essence that they had aided and abetted each other in the appropriation of government materials and equipment for the benefit of Mr. Figueroa's FM tower construction.

In December of 1978 the District Court, on the U.S. Attorney's motion, dismissed those charges.

On May 3, 1982 the U.S. Attorney filed another information against petitioner and Mr. Figueroa charging one count of conspiracy (18 U.S.C. § 371) and other federal charges (18 U.S.C. §§ 2314, 1343, 1001 and 2).[2/] The single conspriacy count alleged that petitioner and Mr. Figueroa conspired in a scheme to defraud the United States with respect to both the truck sales and the road/antenna project.

A mid-trial motion for acquittal resulted in dismissal for all those charges which pertained to the road/antenna project.

Petitioner was found quilty by a jury of the remaining federal charges.

On appeal, the Third Circuit Court of Appeals affirmed, and endorsed the District Court's refusal to dismiss for want of jurisdiction. It explored petitioner's Article III and Due Process contentions and found that American Insurance Co. v. Canter, 26 U.S. 388 (1828) continued to be vital law, and that the "recognized defects in Section 1614(a)" were not of due process dimensions.

2/ There is no constitutional right to a grand jury in the Virgin Islands; thus the U.S. Attorney may freely refile charges by information. Government of the Virgin Islands v. Dowling, 633 F.2d 660 (3rd Cir. 1980).